

Testimony of Daniel P. Tokaji

S.B. 296

Ohio Senate Civil Justice Committee

May 3, 2016

Chairman Bacon and Honorable Members of the Committee, thank you for allowing me to present testimony regarding this bill. I oppose the bill in its present form.

By way of introduction, I am Charles W. Ebersold & Florence Whitcomb Ebersold Professor of Constitutional Law at The Ohio State University, Moritz College of Law. I am also a Senior Fellow with *Election Law @ Moritz*, a nonpartisan program devoted to providing accurate information, analysis, and commentary on election law and administration. My primary area of research and expertise is election law. I am co-author of the casebook *Election Law: Cases and Materials* (5th ed. 2012), author of the book *Election Law in a Nutshell* (2013), and former co-editor of *Election Law Journal*, the only peer-reviewed academic journal in the field. I have written numerous academic articles on various election law topics, including election administration. In addition to Election Law, one of the courses I teach is Federal Courts, a subject to which this bill is germane. This testimony is solely on my own behalf and does not represent the views of any entities with which I am affiliated.

Over the past twelve years, Ohio voters have endured a multitude of problems in attempting to exercise their constitutional right to vote, including long lines, poorly functioning voting machines, voter registration problems, and inequities in the administration of provisional voting and early voting. In numerous cases, courts have found election officials – including both Democrats and Republicans – to have illegally violated state and federal laws protecting the right to vote. Most but not all of these orders have been justified and, if appealed, have been upheld. Occasionally but not often, a court has ordered that polls be opened late to ensure that all eligible voters have the opportunity to exercise this right.

This is not any way to disparage the diligence and integrity of the many public officials in this state who are charged with the sacred duty running our elections. It is, however, to stress the central point that our public officials – especially those with responsibility over the right to vote – must be held accountable. They too must follow the law. And ensuring that they do so is the responsibility of our courts.

Of course, judges are human, just like election officials and all the rest of us. They sometimes make mistakes too. A case in point is the order that was issued by the U.S. District Court for the Southern District of Ohio on March 15, 2016 in the case styled *In re 2016 Primary Election*. That order extended polling place hours in four Ohio counties due to a traffic accident on I-275. No complaint had been filed in federal court. In my opinion, the court lacked subject-matter jurisdiction because there was no “case or controversy” before it as required by Article III of the U.S. Constitution. Nor was there any evident

basis for believing that any federal law had been violated. Accordingly, the injunction was not justified. The Secretary of State and affected election boards have appealed, and I fully expect that they will prevail.

We can stipulate that not every court order is justified. But to say that S.B. 296 is overkill would be an understatement. This bill is the classic case of the cure that is worse than the disease. It will do nothing to solve the problem it purports to solve, especially since the Ohio legislature has no constitutional authority to regulate the procedures followed by federal courts. What it will instead do is to impose practically insuperable barriers on access to state court for voters who are not wealthy but who require speedy redress in order to exercise their fundamental right to vote.

This bill would curtail not just one but two rights that are fundamental in our constitutional democracy: the right to vote and the right of access to courts. Extending the polling place hours is not often necessary, but sometimes it is the only viable remedy for a serious violation of federal or state voting laws, like voters being wrongfully turned away from the polls, the failure to supply an adequate number of ballots, or excruciatingly long lines – like the ones that were seen in Knox County in 2004 or right across the street from my office at the Ohio Union in 2012.

S.B. 296 would dramatically constrict voters' access to the courts by requiring the posting of a cash bond, equal to the cost of keeping the relevant polling places open. It would make access to the courts practically impossible for all but the most affluent whose rights have been violated. While there is an exception for those who are "indigent," this would provide no relief whatsoever for the ordinary, middle-class voter who does not have thousands of dollars at her disposal to post the necessary bond.

A close look at the fine print reveals that the indigency exception is practically worthless. A voter who sues can only obtain relief for herself or herself – not for other voters, even ones at the same precinct, who are affected by the same problem. As all of us understand, the problems that necessitate an order to extend polling hours tend to be systemic, in the sense that they tend to affect multiple precincts and affect multiple voters. The bill would thus slam the courthouse doors in the face of all but the wealthiest voters.

Even voters who surmount this practically insurmountable barrier would be treated unfairly and unequally. The bill violates basic principles of due process, tilting the scales of justice against the voter and in favor of the state. It requires the voter to prove her case by "clear and convincing" evidence, a standard manifestly inappropriate in cases involving the fundamental right to vote. Worse still, it allows for an immediate appeal to an election day panel by election officials – but not by voters who allege that their rights have been violated. I confess that I have never seen such an unbalanced, unfair, and distorted provision in any other piece of legislation regulating elections. It facially violates core principles of fairness and due process and, I expect, will be struck down as unconstitutional.

This brings me to the great irony of this bill: It will exacerbate the very problem it purports to solve. Voters seeking relief for election wrongs will almost surely bring their claims in federal court instead of state court, where they are more likely to obtain a remedy than before. In fact, I anticipate that plaintiffs' lawyers will be lining up to challenge the constitutionality of its various provisions, including

but not limited to the ones I've mentioned – and will be entitled collect attorneys' fees that will come from the state treasury. Any citizen who believes that his or her right to vote has been violated – rightly or wrongly – will now have another cause of action to add to their complaint, a complaint that the procedures mandated by S.B. 296. If enacted into this law, this bill will worsen Ohio's reputation as a hotbed of vote suppression while providing additional legal grounds for challenging election problems.

Let me reiterate that I share the concern that courts have sometimes issued relief in voting cases that is unwarranted by the law. The solution to this problem is not to punish the voter. It is instead to provide a prompt and fair means of resolving such disputes, with speedy appellate review, that treats both the voter and the state fairly.

To the extent that this committee is concerned with renegade judges abusing their authority, let me offer an alternative suggestion, drawn from federal law. Judges generally enjoy absolute immunity from damages lawsuits alleging that they have violated rights protected by the Constitution or other federal laws. There is, however, an exception to the judicial immunity that judges enjoy in cases where they act in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349 (1978). In one case, for example, a judge who had a food vendor handcuffed and brought before him for selling "putrid" coffee was held liable for compensatory and punitive damages. *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978). If the real concern is with judges acting contrary to the law, the solution is to have those judges held accountable by holding them civilly liable where appropriate, not to punish the voter.

Thank you for considering my testimony.